

Testimony
PSC Chair Greg Jergeson
In opposition to
House Bill 491
February 16, 2009

EXHIBIT 13
DATE 2-16-09
HB 491

Chairman Noonan and members of the Committee:

The PSC has voted unanimously to oppose HB 491, as written, because it unfairly alters the balance between utilities and qualifying small power production facilities (QFs); may lead to unnecessary litigation; reverses a well-reasoned, established Commission policy; conflicts with federal law; and contains technical errors. The specific provisions of the bill which the PSC finds problematic are as follows:

- Section 1 and section 4, page 3, lines 6-8, alter the current balance between QFs and utilities in an unfair manner. Taken together, they impose a one-sided obligation on a utility to negotiate in good faith and a one-sided private right of action for QFs to seek civil penalties against a utility in the courts. QFs are not required to bargain in good faith; utilities are not authorized to seek penalties against a QF. This private right of action may lead to unnecessary litigation. Furthermore, the first paragraph of section 1 is unnecessary. Section 69-3-209, MCA, provides that a utility that violates any provision of Title 69, Chapter 3 or refuses to obey any lawful requirement or order of the Commission is subject to a fine of not less than \$100 or more than \$1,000. Precedent has established that each day is a separate violation.
- In section 2, the definition of "standard rate" reverses a well-reasoned, established Commission policy by extending the availability of the standard rate to QFs of all capacity. Federal regulation, 18 CFR 292.304(c), requires that standard rates be available for QFs with a design capacity of 100 kilowatts or less and permits standard rates for larger QFs. In 1992, the Commission adopted a rule that provided for standard rates for QFs of up to 3 megawatts capacity. In 2007, the Commission amended its rule to provide for standard rates for QFs of up to 10 megawatts capacity. In the rulemaking proceeding, utilities advocated for a limit of 5 megawatts and QF developers advocated for a limit of 20 megawatts. The Commission carefully evaluated the comments and concerns of all who participated in the rulemaking and determined that the proper capacity limit for availability of standard rates is 10 megawatts. The Commission is not aware of any evidence that would support reversing its policy and extending the availability of standard rates to QFs as large as 80 megawatts.
- Section 5, page 3, lines 29-30, conflict with federal law. 18 CFR 292.304(d) provides that rates for purchases by a utility be based on avoided costs as calculated either when a legally enforceable obligation is established or at the time of delivery, depending on the type of sale by and choice of a QF. The proposed provision would conflict with federal law by eliminating the possibility of basing avoided cost on the time of delivery.
- Finally, the bill contains technical errors that will create difficulties in interpretation. The bill contemplates three separate classes of rates: negotiated rates, the standard rate, and contract rates. Neither "negotiated rate" nor "contract rate" is a defined term. Section 5, page 4, lines 9-10, is ambiguous and may limit the Commission's ability to consider all appropriate factors in establishing a contract rate.

For these reasons, the PSC recommends that you give HB 491 a do not pass.